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HONG SAIK POH & ORS.

v.

PANG KEK LAN

HIGH COURT MALAYA, ALOR SETAR

KC VOHRAH J

b

[CIVIL APPEAL NO. 12-01-90]

23 JANUARY 1992

TORT: *Liability - Plaintiff 70% and defendant 30% - Whether the learned Judge in the instant case erred when he held the defendant to be 30% liable for the accident - No grounds given to show that the defendant was contributorily liable.*

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A head on collision occurred between a motor car driven by Cha Tham (now deceased) and a motor lorry driver by the defendant along the Alor Setar - Sungai Petani road.

The learned Judge of the Sessions Court, Alor Setar found Cha (the deceased) to be 70% liable for the accident and the first plaintiff appealed against this finding of liability while the defendant cross - appealed against the finding that he was 30% liable. And the learned Judge of the appellate Court dismissed the appeal and allowed the cross - appeal.

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Inter alia, it was noted that the learned Judge of the Court of first instance had made a definite finding that the defendant's version of the accident was more probable and this finding turned on two grounds:

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Firstly, because he found the story of the 1st plaintiff about the evasive measures taken by Cha just before the accident to be incredible and improbable, and secondly, because the brake marks shown in the sketch beginning from the side of the road along which the defendant's lorry was properly proceeding towards Alor Setar and ending on the other side of the road where Cha's car should have properly been travelling "confirmed and corroborated the defendant's allegation that the deceased had encroached on to his lawful side of the road as the starting point of the brake marks on the left side towards Alor Setar indicated the point of impact."

*f***Held:**

[1] The High Court in applying the Privy Council view of the case *Yahya bin Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117 found no reason to come to a different conclusion. Than that of the learned Judge who heard and saw the witnesses that the defendant's story was more probable than the story of the plaintiff.

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[2] However, the learned Judge in the instant case erred when he held the defendant to be 30% liable for the accident. This cannot be after he had found the version of the defendant as to how the accident had taken place as more probable. There are no grounds in his judgment and indeed he could not show that the defendant was at all contributorily liable, let alone 30% liable.

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[Appeal of the appellants/plaintiffs dismissed and the cross appeal of the respondent/defendant allowed with costs.]

Case referred to:

Yahya bin Mohamad v. Chin Tuan Nam [1975] 2 MLJ 117 (*foli*)

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For the appellant - N.M. Tiong; M/s. N.M. Tiong & Co.

For the respondent - Vello; M/s. Vello & Associates

JUDGMENT

KC Vohrah J:

A head on collision occurred between a motor car driven by Cha Tham (now deceased) and a motor lorry driven by the defendant along the Alor Setar - Sungei Petani road. The learned Judge of the Sessions Court, Alor Setar found Cha to be 70% liable for the accident. The wife and children of Cha together with the passenger in Cha's car at the time of the accident, the first plaintiff, appealed against this finding of liability while the defendant cross - appealed against the finding that he was 30% liable. And I dismissed the appeal and allowed the cross - appeal.

The evidence was that the accident occurred at about 6 a.m. and it was dark then. It was not disputed that it was drizzling and the road was slippery at that time.

Cha was driving the car towards Sungei Petani with PW3 beside him while the defendant was driving his motor lorry in the opposite direction towards Alor Setar.

There were 2 completely different versions of the accident, one given by PW3, the other by the defendant.

PW3 said that while Cha was driving on his correct side of the road he saw the defendant's motor lorry, in attempting to overtake another vehicle, encroach into Cha's path at high speed. As a result a head on collision occurred despite Cha's evasive measures to avoid it.

The defendant, however, stated that Cha for some unknown reason encroached into his path. He braked his vehicle but due to the drizzle and the slippery road he lost control of the lorry and a collision occurred.

It has to be noted that the learned Judge made a definite finding that the defendant's version of the accident was more probable. He based his finding principally on 2 grounds, **firstly**, because he found the story of the 1st plaintiff about the evasive measures taken by Cha just before the accident to be incredible and improbable, and **secondly**, because the brake marks shown in the sketch beginning from the side of the road along which the defendant's lorry was properly proceeding towards Alor Setar and ending on the other side of the road where Cha's car should have properly been travelling "confirmed and corroborated the defendant's allegation that the deceased had encroached on to his lawful side of the road as the starting point of the brake marks on the left side towards Alor Setar indicated the point of impact."

PW3, it will be remembered, said that he saw the defendant's lorry attempting to overtake another vehicle and encroach into Cha's path at high speed. He said that when he saw the defendant's lorry, the lorry was about 30 feet to 40 feet away. He described the evasive measures that Cha took that dark morning: Cha flashed his lights. The lorry continued coming on. Cha braked and slowed down the car but the road was slightly slippery because of the rain. Cha sounded his horn. The vehicle was still coming fast and Cha straightaway braked. PW3 stated that the accident took place in a split second (sekelip mata). He said that he saw the light from the lamps of the lorry and he first saw the lorry when it was overtaking another vehicle; he did not see it earlier because he was talking to Cha. He said he fainted after that.

The learned Judge found it "incredible and improbable" for Cha to have taken the evasive measures as described by PW3 within such a short time. He also pertinently questioned how PW3 could have witnessed all the things done by Cha if he, as admitted by him under cross

a - examination, "first saw the defendant's lorry only when it was overtaking and just before the sound of the collision because he was at the time talking to the driver." What has to be remembered is that PW3 had also stated that the accident took place in a split second.

b Counsel for the plaintiffs, the appellants, argued that there was no evidence as to when Cha first saw the lorry because the distance of 30 feet mentioned by PW3 related to PW3's first sighting of the lorry; in other words, Cha could have taken the evasive measures at an earlier point of time. But in the context of PW3's story the evasive measures taken by Cha were taken after he (PW3) had spotted the lorry encroaching on Cha's path and that was when PW3 saw it about 30 to 40 feet away. The argument cannot stand.

c The defendant's evidence was that he first saw the oncoming vehicle on its correct side of the road 200 yards away. When the car was about 60 to 70 feet away, it suddenly encroached into his side of the road. He applied his brakes and because of the rain he could not control the vehicle and the accident occurred. He denied overtaking any vehicle and he said that there were no vehicles in front of his lorry on his side of the road. He denied that Cha flashed the lights or sounded the horn of his car. In further elaboration of the accident he stated that the front offside of the lorry was hit; that the lorry went out of control and it went to the other side of the road. The defendant also said that his steering had jammed. It does appear that since, from his evidence, the damage of his lorry was to the front side and to the steering, the steering was jammed after the collision.

e Counsel for the appellants attacked the defendant's version of the accident and said the PW3's version should have been accepted. He argued that if the defendant's story is true he should have swerved to his left to avoid the impact. The point is if the defendant's story is true that the car encroached into his path just some 60 to 70 feet away what evasive measures could the defendant have taken to avoid the collision let alone swerve to the left? The Counsel also argued that the point of impact could not have been on the defendant's side of the road and he disputed the learned Judge's finding that the brake marks on the sketch plan confirmed and corroborated the defendant's allegation that the defendant had encroached into his path. Specifically he attacked the finding of the Judge that the starting point of the brake marks on the correct side of the defendant's lorry indicated the point of impact between the defendant's lorry and Cha's car. He said there was no basis for that finding because there were no broken pieces of glass there. The photographs show extensive damage to the front of Cha's car, the windscreen, the glasses on the side windows and the front lamps of the car. There, therefore, must have been glass fragments at the scene of the accident but the sketch plan does not show any broken glass at all there. It seems a fair inference that the police officer who drew the sketch did not pay attention to the broken glasses at the scene as indeed he did not pay attention to the measurements that needed to have been taken at the accident scene. In any event, it is not possible to say with any certainty where the broken glasses from either of the vehicles would have been distributed on the road and there is no merit in counsel's argument that because there were no broken pieces of glass at the start of the brake marks of the lorry that that could not have been the point of impact of both the vehicles. Even if the start of the brake marks may not necessarily indicate the point of impact it does show that there cannot be any truth in PW3's story that the defendant's lorry was overtaking another vehicle and had encroached into the path of Cha's car at high speed.

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Put in a nutshell, the learned Judge disbelieved the story of the 1st plaintiff (PW3) and instead found the story of the defendant more probable and he was of the view that the defendant's story that Cha encroached into his path as a result of which he braked and lost control was corroborated by the fact that the tyre marks shown in the sketch plan start from his correct side of the road and traverse to the other side of the road. In any event, as I have mentioned earlier, since the tyre marks are clearly shown as starting from the defendant's side of the road there can be no truth in PW3's story that the lorry was attempting to overtake another vehicle and had encroached into the path of Cha's car at high speed.

In *Yahya bin Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117 the trial Judge relied on the evidence of the plaintiff and a witness Omar bin Isa and the evidence of the sketch plan and police photographs to hold the plaintiff was at all times riding properly on his side of the road and that the accident occurred on his side of the road. The defendant who was driving his car in the opposite direction had alleged that the plaintiff while riding on his bicycle had swerved into the path of his car. The Federal Court, however, held that the trial Judge had drawn wrong inferences from the sketch plan and photographs and allowed the appeal of the defendant. In the Privy Council the appeal of the plaintiff was allowed. The Privy Council held that as the trial Judge had based his finding on the evidence of the plaintiff and his witness, Omar, his finding would not be disturbed.

It was pointed out by Lord Edmund - Davies at p. 123:

The percentage of traffic accident cases which can be satisfactorily decided wholly independently of oral testimony must be very small, and this is certainly not one of them. To say that all its features can be wholly explained by accepting one side rather than the other would be inaccurate; for example, the distribution of debris as marked on the sketch - plan is in some respects difficult to comprehend. But the board entertains no doubt that the oral evidence, and particularly that of Omar, and the manner in which it was given, must have played a dominant part in the formation of the trial Judge's conclusion. The Federal Court, though lacking the inestimable advantage of seeing the witnesses, thought fit to say that "Omar lied so brazenly" and that he "continued to lie". But their Lordships have no doubt that this is not one of those rare cases where an appellate Court, lacking the advantage of seeing and hearing the witness, was justified in coming to such a conclusion on credibility.

I can see no reason to come to a different conclusion from that of the learned Judge who heard and saw the witnesses that the defendant's story was more probable than the story of the defendant. It is unfortunate, however, that the learned Judge in the instant case erred when he held the defendant to be 30% liable for the accident. This cannot be after he had found the version of the defendant as to how the accident had taken place as more probable. This version being that Cha had encroached into the defendant's path on the defendant's proper side of the road, Cha was then wholly liable for the accident. There are no grounds in his judgment and indeed he could not have had any grounds to show that the defendant was at all contributorily liable, let alone 30% liable. And I therefore dismissed the appeal of the appellants/plaintiffs and allowed the cross appeal of the respondent/defendant and allowed him cost. I also ordered the deposit of the appellants be paid towards the respondent's taxed costs.

Also found at [1992] 2 CLJ 1009

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